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Comments in response to 68 Federal Register 23808 (May 5, 2003)
Submitted Electronically to: http://dms.dot.gov
and in duplicate by United States First Class Mail

False and Misleading Statements Regarding Aircraft Products, Parts and Materials

Comments on the Notice of Proposed Rulemaking

Submitted by the Aviation Suppliers Association

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August 4, 2003

Docket Management System
U.S. Department of Transportation
400 Seventh Street, SW
Room Plaza Level 401
Washington, DC 20590-0001

Docket No. FAA-2003-15062

Dear Sir or Madam:

Please accept these comments in response to the Federal Register Notice of Proposed Rulemaking published at 68 Federal Register 23808 (May 5, 2003) (False and Misleading Statements Regarding Aircraft Products, Parts and Materials) [hereinafter "False and Misleading Statements NPRM"].

Contents

What is ASA?

Founded in 1993, The Aviation Suppliers Association ["ASA"] represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace. Even though parts distributors are not FAA certificated entities, they play an important role in aviation safety, and many of them have taken it upon themselves to police the quality of their own industry by developing in-house quality systems.

ASA is a proponent of industry quality systems that help assure that aircraft parts sold to operators, repair stations and mechanics are properly documented. For example, ASA is one of the FAA's partners in the Voluntary Industry Distributor Accreditation Program.

As a proponent of quality, ASA supports efforts to improve the safety and quality of aircraft parts and maintenance; in particular, ASA supports efforts to eliminate fraud and imprecision associated with commercial transactions in aircraft parts.

Summary of ASA's Position

ASA has always been a supporter of efforts to eliminate fraud in the industry, as well as efforts to clarify business terms and transactions. However, ASA cannot support vague standards that would cause more harm than good to our efforts to

eliminate fraud and misleading statements. For this reason, ASA recommends that the language of this rule be tightened to eliminate vague standards that could be applied in nearly any case (creating a 'nonstandard'). These vague standards include those addressing implications (as opposed to affirmative statements) and those addressing the terms "airworthiness" and "acceptable for installation" (which have defied definition despite FAA efforts to better describe what the terms mean).

In addition, ASA and its members are strong supporters of the freedoms and protections guaranteed by the Constitution. ASA opposes regulations that would purport to permit otherwise unconstitutional searches. For this reason, ASA opposes the section 3.5(f) search provisions.

Finally, this proposal would add new responsibilities to the FAA. These regulations would impose on the FAA an obligation to pursue commercial speech violations that may have little or nothing to do with safety issues. The FAA is already experiencing problems in meeting its current regulatory obligations. There are other administrative and law enforcement agencies that already address fraud adequately, and there has been no showing that they have failed to adequately respond to fraud and related issues in the aviation industry. In light of the significant changes that need to be made to this proposal, and the FAA's other resource commitments, ASA suggests withdrawing this regulation pending further study.

I. FAA Does Not Have the Resources or Expertise to Handle this New Responsibility

FAA is proposing to establish a new FAR part (Part 3) that would require the FAA to begin overseeing the commercial documentation that is passed throughout the industry and review it to assess compliance with the new standards. This proposed rule regulates commercial speech – a practice that is not within the FAA's core mandate. Because this proposal falls outside of the FAA's core mandate, it should be no surprise that the FAA is ill-prepared to enforce these proposed regulations – the FAA lacks the technical expertise to enforce commercial speech standards, it lacks published standards to apply to commercial speech, and it lacks training on commercial speech issues.

The FAA lacks the resources and expertise to properly enforce the proposed regulations in an objective, uniform fashion. If the FAA takes over regulation of commercial speech in the aviation industry, it is likely that other agencies with concurrent jurisdiction will reallocate their scarce resources to avoid duplication of effort. If this happens, and the FAA is unable to commit significant resources to the enforcement of these proposed regulations, it could result in a diminution of law enforcement activity monitoring commercial speech within the aviation

industry – a consequence that would achieve the opposite result from the intended result.

A. Lack of Resources

Some of the new standards established in FAR 3 are well-known by law enforcement personnel– for example the standards for fraud are well established within the law. This does not mean that individual employees of the FAA, who have not previously been tasked with enforcing such standards, know or understand them. In fact, fraud prevention training has not been a part of the FAA's inspector curriculum because it is not (currently) something that falls within the FAA's current enforcement responsibilities.

On the other hand, a number of the other standards proposed by the FAA - like the standard for implied misleading statements - are not as well understood in law enforcement. Such standards would require a special emphasis in training because of their novelty. These standards may be analogous to similar standards established by other regulatory regimes (such as the deceptive statements standard used by the SEC), or they may develop differently. The current NPRM does not provide sufficient details about how these novel and vague standards will be interpreted to gauge what sort of training would even be necessary.

These new training requirements, and the new responsibilities associated with the proposed new FAR Part 3, present a significant resource allocation problem. Currently, the FAA does not have the resources to accomplish the functions already described in its regulations. See, e.g., Resource Utilization Measure 66 Fed. Reg. 38387, 38389 (July 24, 2001) (explaining that the FAA does not have the resources to continue performing certain tasks). It does not make sense to add a significant new responsibility – oversight of commercial documentation – when the FAA does not have the resources to perform its current tasks.

B. FAA's Different Expertise and Congressional Intent Suggest that FAA is Not Meant to Engage in This Sort of Oversight

Furthermore, the new task that the FAA is setting for itself, oversight of commercial documentation, does not match well with the core competencies of the FAA. The FAA has field inspectors with significant experience in areas like maintenance, manufacturing, operations, and oversight of these three areas. The FAA does not currently hire inspectors to assess commercial documentation for fraud purposes, so it does not have such a core competency.

There are other agencies within the Federal Government that already address such functions, and that have a demonstrated core competency in oversight of fraud. The Federal Trade Commission, for example, has laws and regulations that already address issues of commercial fraud. Fraud is also addressed by local law enforcement activities, and also by Federal prosecutions. Aircraft parts fraud in particular is subject to a new federal statute that has proven very effective in its short tenure. 18 U.S.C. § 38. The existence and use of this Federal statute demonstrates that there is no need for the FAA to also claim concurrent jurisdiction.

The FAA does not have a legislative mandate to duplicate the functions of the FTC for these purposes. In fact, Congress has indicated an intent to prevent the FAA from assessing questions of fraud. In recent legislation concerning revocation of certificates as a consequence of findings of fraud, Congress kept the FAA separated from the decision-making process related to fraud. Instead of permitting the FAA to hold hearings concerning findings of fraud in order to assess whether a revocation was warranted, Congress directed the FAA to revoke certificates based on the findings of other courts and agencies. 49 U.S.C. § 44726. The FAA was specifically prohibited from reviewing such findings. 49 U.S.C. § 44726(b)(2). Only upon a request from a law enforcement agency was the FAA permitted to disturb the automatic revocation. 49 U.S.C. § 44726(a)(2) (permitting an exception based on the request of law enforcement).

The FAA's resources are stretched thin, and other agencies already regulate fraud adequately with the assistance of the FAA. The FAA does not currently regulate commercial speech so it is not one of the FAA's core competencies. There is no pressing need for these regulations. For all these reasons, ASA recommends that this rulemaking project be abandoned.

II. FAA Has Failed to Establish Appropriate Regulatory Standards

A. Subjective Standards Void for Vagueness (§ 3.1)

Proposed section 3.1, the applicability section, reads as follows:

> This part applies to persons engaged in aviation-related activities, as set forth in this part.

This description of the applicability is simply overbroad. It permits the FAA to exercise jurisdiction over matters that fall outside of the safety arena. For example, an internal company memorandum (which is a company record)[1] that incorrectly describes an aircraft part as airworthy would reflect a violation, despite

[1] The definition of the term "record" encompasses ALL records – not just those with aviation safety significance.

the fact that the misstatement was not intentional, and the misstatement did not represent a record of the sort upon which a third party might rely. Usually, companies have quality systems and other mechanisms to detect such misstatements before they could have any adverse effect. In many cases, the instances may be self-reported to an accreditation body in order to permit auditing to assure that the problem does not arise again. Such errors should not be subject to FAA civil penalty when they cannot have an adverse affect on safety.

We recommend that the applicability statement be limited as follows:

> **RECOMMENDED NEW LANGUAGE FOR SECTION 3.1:**
> This part applies to records, and the persons who make them, when the records concern aircraft products, aircraft parts, or aircraft materials. This part only applies to records upon which someone might reasonably rely in making a decision authorized under this chapter that could affect the airworthiness of an aircraft or safety of flight.

B. ASA Supports FAA's Efforts to Prohibit Fraud (§ 3.5(c))

Notwithstanding the fact that existing laws appear to be sufficient to address parts fraud, and the addition of concurrent jurisdiction through FAR 3 appears to be unnecessary, ASA sees no other problems with proposed section 3.5(c).

Proposed section 3.5(c) is captioned as a "prohibition against false statements." That section prohibits anyone from making fraudulent or intentionally false statements representing the airworthiness of any type certificated product, or the acceptability of any part or material for use on type certificated product. There is sufficient case law on fraud and intentionally false statements that permits this to be a reasonably objective standard. ASA supports provisions like this: provisions that establish standards that can readily be understood by the industry.

C. There are Serious Flaws in Subsections 3.5(d) and 3.5(e)

ASA has particular objections to the language of subsections 3.5(d) and 3.5(e). These objections are summarized in this portion of the discussion, and the specifics of the objection are then discussed below.

- the inclusion of implicit representations (in addition to express representations) as violations; and
- the requirement to "show with appropriate records that the product is airworthy or that the part or material is acceptable for installation on a type certificated product"; and

- the reliance on airworthiness as a standard for demonstration when the term airworthy remains undefined in the regulations

Proposed section 3.5(e) is captioned as "FAA airworthiness standards." This proposed subsection also establishes vague standards and requires reliance on records that do not exist, and for which there is no legal requirement. ASA particularly objects to:

- the inclusion of implicit representations (in addition to express representations) as violations; and
- the requirement to rely on and ensure historical information concerning production approval that is not uniformly maintained by the industry and that is generally not available for parts currently in industry inventories; and
- the requirement to state that a part "was not produced under an FAA production approval" just because it does not bear a species of documentation that is not currently required under any regulatory or legal standard; and
- the implication that it is possible to conclusively ensure that a part, or material was produced under an FAA production approval – that fact is often impossible to ascertain, and the FAA has resisted efforts to make it possible to ascertain such a fact.

1. Implicit Representations as Violations Creates a Unworkable Subjective Standard

Sections 3.5(d) propose to make it a regulatory violation to imply (or cause to be implied) facts concerning airworthiness or acceptability for installation unless those facts can be verified in records. Sections 3.5(e) propose to make it a regulatory violation to imply (or cause to implied) that a product, part, or material meets FAA airworthiness standards unless the person can verify that the product, part, or material was produced under an FAA production approval.

There is no objective standard that lets the industry know what sort of communication is considered to imply a fact.

When no standard of conduct is specified at all, the prohibition is unconstitutionally vague. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Unconstitutionally vague laws have been described as those where "men of common intelligence must necessarily guess at its [the law's] meaning." Id. In the proposed regulation at issue here, one must guess at what it means to imply a fact – what level of affirmative act is necessary, and upon what subjective standard will an unspoken fact reflect an implication?

2. FAA is Trying to Fabricate a Regulation that Diverges Significantly From Normal Legal Constructs

Other agencies have applied a deceptive language standard to certain communications. For example, the SEC's rule 10b-5 addresses fraud and deceit. When misleading statements have been actionable under U.S. regulations, though, there is generally a scienter requirement. E.g. SEC v. Infinity Group Co., 212 F.3d 180, 191-192 (3rd Cir. 2000) (explaining the scienter requirement of SEC's rule 10b-5).

There is no scienter requirement in the FAA rule. In addition to the fact that this diverges from existing US legal policy, it creates yet another unworkable standard. An 'implication' element would make scienter difficult (if not impossible) to prove. This is because, in the absence of proof of intent, the courts will often construe the logical consequences of one's actions as evidence of intent to accomplish those logical consequences. E.g., Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968); Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 227 (S.D.N.Y. 1975). Thus the plain language of a statement may be used to construe intent. Under the FAA's proposed regulations, though, the plain language would not be the subject of the violation, but rather something that the plain language implies would be the subject of the violation. In such a situation, one would not be able to use the plain language as evidence of scienter because the plain language is not the subject of the violation – the implication is.

Another significant difference between other agency regulations concerning deceit and the FAA's proposed regulation concerning fraud and misleading statements is that the other agency regulations each exist in a context of a rich regulatory body of information concerning what is an acceptable documentation or statement and what is not. There is no such rich body of regulatory authority in this case. In fact, the FAA currently has NO regulations that explain what commercial documentation concerning parts ought to include or address. Reliance on industry standards would be inappropriate in this situation because there are no uniform industry standards – in fact there is a wide variety of commercial documentation in the industry (a fact that contributes to confusion in the industry, but also a fact that would not be remedied by the proposed regulation).

The FAA proposes to create a regulation that does not include scienter as an element. Thus, persons in the industry would be strictly liable for the their violations, but in the absence of clear standards of conduct, their violations would still be dependent on the subjective determination of an FAA inspector aboiut

what constitutes an implication that may be misleading. Creating a regulatory violation that engages a strict liability standard without establishing well-defined objective standards of conduct is simply too vague an approach to withstand constitutional scrutiny.

If the FAA decides to proceed with a strict liability regulation concerning commercial documentation (a regulation in which scienter is not an element of the violation) then this would be an unprecedented step. Such an unprecedented step should not be taken without a clear need or Congressional mandate – neither of which is present in this case.

3. The Standards Are Unconstitutionally Vague in this Context

Sections 3.5(d) propose to make it a regulatory violation to imply (or cause to be implied) facts concerning airworthiness or acceptability for installation unless those facts can be verified in records. There is no clear description of what airworthiness really means. The FAA has admitted that there is no regulatory definition, and explained that the reason there is no regulatory definition is because the term is used in different ways throughout the regulations. FAA Chief Counsel Interpretation 1988-16 (June 17, 1988). According to an FAA Chief Counsel opinion, there is no need to define what airworthy means, because in each case where it is used in the regulations, "it is clearly used as a summarizing or shorthand term denoting the aggregate of requirements that are concurrently spelled out." Id. There is no such concurrent description of what the term means in the circumstance of this proposed regulation.

For example, the airworthiness of an aircraft in the context of post-maintenance operation may be described as conformity to type design and in a condition for safe operation. E.g. FAA Chief Counsel Interpretation 1991-30 (May 22, 1991). If a person describing an aircraft as airworthy was to follow the proposed regulation, which requires reliance on records to prove the fact of airworthiness, then the individual would have to have access to the type design in order to prove conformity with the type design. This is unreasonable, since type design information is generally protected as a trade secret by type design holders.

There is even less authority to explain what it means to be acceptable for installation. This is not a defined term and it is not a term that has a clear meaning. In one advisory circular, acceptable parts are circularly described as those that have been found acceptable through test and inspection. See, Eligibility, Quality, & Identification of Aeronautical Replacement Parts, Advisory Circular 20-62D para. 4(b) (May 24, 1996) (also finding that standard parts and owner-operator produced parts are also acceptable). One may presume that this term is meant to reference something like the findings made by an installer of a

part who makes a determination of compliance under 14 C.F.R. § 43.13. To the extent that it can be recharacterized as compliance with 14 C.F.R. § 43.13, this is still not a workable standard for distributors and other persons who do not hold FAA certificates (and are thus ineligible to make § 43.13 findings) but that nonetheless engage in aircraft parts transactions. Determining compliance with 14 C.F.R. § 43.13 is a specialized function engaged in by persons authorized to conduct maintenance activities under Part 43. It is not a simple procedure that can be reduced to objective regulatory standards (or someone would have done so already). This term, "acceptable for installation," is void for vagueness in this context.

Finally, there is no clear standard for what sort of records would be considered sufficient in this context. The FAA has no regulations for what sort of records must be transferred with a part. This issue is further addressed in section 4, infra.

4. Section 3.5(e) Requires a Fraud in Some Cases

Sections 3.5(e) propose to make it a regulatory violation to state or imply that a product, part, or material meets FAA airworthiness standards unless the person can verify that the product, part, or material was produced under an FAA production approval. The consequence of not having proof to verify production under an FAA production approval is that the part must be clearly and expressly described as NOT produced under an FAA production approval.

This is an illegitimate standard because the fact that a part was produced under an FAA production approval is not always related to the proposition that such a part meets FAA airworthiness standards. Parts can meet the FAA's airworthiness standards without being produced under a FAA production approval. Owner-operator produced parts, parts produced in the context of a maintenance operation, and parts produced under a foreign approval and accepted in the United States under a bilateral agreement are just a few examples.

This proposed standard simply does not work for many parts in the industry. It is common for parts to be divorced from the proof that they were produced under an FAA production approval. Most parts installed in aircraft cannot be proven to have been produced under a production approval – there is simply no chain of evidence to make that verification. Similarly, many parts removed from aircraft for repair or overhaul suffer from this problem (lack of traceability). Under the proposed regulation, the bearer of the parts would have to make the Hobbesian choice of 1) failing to assert or imply airworthiness (an overhaul tag, for example, implies airworthiness since a part cannot be described as overhauled unless it was tested and met the overhaul standards – 14 C.F.R. § 43.2) which would be devastating to business relationships in the aviation industry or 2) affirmatively

stating that the part was NOT produced under an FAA production approval – a statement that is most likely inaccurate.

This also requires a sort of reverse palming off that would appear to violate the Lanham Act. See, e.g., Williams v. Curtiss-Wright Corp., 691 F.2d 168, 174 (1982) (issuing a preliminary injunction to prevent reverse palming-off of aircraft parts). The person who stated that the part met FAA airworthiness requirements but that it was not produced under an FAA production approval would be marketing the part in a manner inconsistent with the trademark holder's markings. Since the Lanham Act would prohibit such representations, the FAA regulations should not require such representations.

5. The FAA is Requiring Reliance on Records That Often Do Not Exist and Further There is No FAA Standard that Requires this Documentation

Section 3.5(d) and 3.5(e) both require reliance on records. The preamble to the proposed rule suggests that the records are "the kind that are relied on by owners, operators, producers and maintainers to determine the airworthiness of an aircraft, or the acceptability of aircraft products and parts." See, False and Misleading Statements NPRM, 68 Federal Register 23808, 23810-811 (May 5, 2003). However, even in this situation there are no clear standards for what one may use and what one may not use. Installers may rely on records or they may rely on non-record evidence, like visual inspection of the part, dimensional inspections, or parts markings.

The FAA has published no clear standard for what sort of records would be considered sufficient in this context. Part of the reason there is no clear published standard is because documentation is not required at all for parts. Current FAA rules do not even require that documentation be issued for parts, nor that documentation be maintained for parts. E.g. FAA Chief Counsel Interpretation 1992-35 (June 1, 1992) (explaining that there is no uniform method for tracking life limits, and any method that achieves the goal of accurately knowing current life status is sufficient). It is only a matter of recent industry standard that documentation has been commercially required for aircraft parts – historically parts were often bought and sold with little or no documentation. As a consequence, many, many parts in the inventories of industry parties do not have the sort of records that would seem to be required under this proposal.

It may be argued that Part 43 has reasonably clear standards for documentation following a maintenance activity. 14 C.F.R. § 43.9. However, these sort of records are explicitly excepted from the proposed regulation, because there is already an antifraud rule that applies to them. 14 C.F.R. § 43.12. Thus, the only

clear exposition of parts documentation standards in the regulations is not even a standard applicable to the proposed regulation.

In fact, FAA guidance permits a wide variety of documentation to follow parts in the commercial arena. See, Eligibility, Quality, & Identification of Aeronautical Replacement Parts, Advisory Circular 20-62D para. 7 (May 24, 1996) (providing seven different recommended documents for identifying acceptable replacement parts, but failing to explain what should be included in the commercial documentation). This allowance of a wide variety of documents, with no standard for what is - and what is not - acceptable, suggests that the FAA has no standards for what would constitute sufficient records to constitute verification under this new regulation. This flaw makes the regulation void for vagueness.

The FAA's existing recommended standards for commercial documentation are broad and may be summarized as saying that whatever documentation one receives, should then be passed on to subsequent purchasers. Voluntary Industry Distributor Accreditation Program, Advisory Circular 00-56A (June 13, 2002) (providing a table of documentation that permits a wide range of documentation, so long as the documentation received is then transferred to the subsequent purchaser of the part – maintaining the information available for future purchasers). This does not impose limits on what sort of commercial documentation may be produced and distributed.

Whereas the FAA has no general requirements for parts documentation, and no published standards for what is acceptable or not acceptable among commercial documents, there is an insufficient foundation upon which to rest the FAA's proposed rule. Before promulgating the rule that requires adequate documentation as a condition of otherwise truthful assertions, the FAA should first concentrate on establishing reasonable uniform standards for commercial documentation.

6. The Records Requirements of Proposed Section 3.5 Would Have a Tremendous Financial Effect on Existing Inventories

The FAA has failed to address the fact that many parts in current inventories do not have records. In many cases an installer is able to make a determination concerning airworthiness based on the testable physical characteristics of the part.

The proposed rule would make record-less parts commercially unsalable, because it would not permit the parts to be sold unless there was an explicit statement that they were not produced by a production approval holder – a potentially false statement in its own right.

This would reflect a tremendous economic impact to the inventories of distributors. The FAA has totally failed to address this cost – instead, the FAA has ignored this cost.

Although the proposed rule would certainly affect the undocumented inventory in the aviation industry, it would be impossible to quantify the total value of inventory that would be impacted because the FAA has failed to provide objective standards for what constitutes adequate records for purposes of supporting an airworthiness/acceptability statement (so it is impossible to gauge what record-sets are adequate).

7. Documentation Standards Should be Established in a Manner that Makes Compliant Documentation Reasonably Available to the Industry

The FAA is putting the cart before the horse. The section 3.5(d) proposal concerning airworthiness or acceptability records would effectively require 'adequate' documentation to support all commercial transaction in aircraft parts. However, the FAA has failed to establish standards for what sort of documentation will be considered adequate or appropriate.

This is significant because the proposed regulation's reliance on 'adequate' records means that someone will have to decide what reflects adequate records – if the FAA does not do so by regulation then it will sure encounter widely divergent interpretations from one FAA field office to the next.

More importantly, the impact of this proposal would fall heavily on the aircraft parts distribution community. That community has long supported reasonable documentation requirements. For example, ASA has been a strong supporter of the AC 00-56 accreditation program. See, e.g., Voluntary Industry Distributor Accreditation Program, Advisory Circular 00-56A para. 5(a) (June 13, 2002) (explaining that the ASA was one of the organizations that helped develop the accreditation program). ASA has supported efforts to require manufacturers to issue 8130-3 tags as 'birth records' for all new parts. This proposal is part of the package submitted to the FAA in 1999 by the Aviation Rulemaking Advisory Committee (Part 21 Revision Package). Through the issuance of 8130-3 tags for all new parts, that package would have established a foundation for uniform, effective documentation in the industry – subsequent distributors would then be able to pass-along 8130-3 tags obtained from manufacturers. Almost four years later, the FAA has still taken no action on this effort to harmonize commercial documentation standards.

Until the FAA establishes standards for what constitutes adequate commercial documentation ("records"), the FAA should not be promulgating regulations that make it a violation to make common aviation industry statements 'without adequate records.'

III. Subsections 3.5(f) Permits Unconstitutional Searches

ASA objects to subsections 3.5(f). This subsection states that

> [E]ach person who expressly or by implication represents, or causes to be expressly or by implication represented, in any record that a type certificated product is airworthy, or a part or material is acceptable for installation on type certificated product, shall allow the Administrator to--
>
> (1) Inspect and copy records relating to the source and acceptability of the product, part, or material; and
>
> (2) Inspect the product, part, or material.

The Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. E.g. Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978). Unless some recognized exception to the warrant requirement applies, a warrant is necessary to conduct an inspection. Id. at 313; see also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause"). The FAA has alleged no exception to the warrant requirements of the Fourth Amendment that would apply in this case (and therefore there is no opportunity to comment on the FAA's reasoning for this intrusion on the Fourth Amendment).

Despite the fact that the FAA has alleged no 'well-defined' legal basis for ignoring the Fourth Amendment, reasons can be postulated; however any reasonable basis that could be postulated is inapplicable to the factual situation before the agency.

Exceptions to the Fourth Amendment apply to pervasively regulated businesses, and for closely regulated industries. Marshall v. Barlow's, Inc., 436 U.S. at 313. This theory is limited, though – the Marshall case makes the basis for this exception clear: the "element that distinguishes these enterprises [in Marshall] from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id. at 313.[2] The FAA has not previously regulated the distribution of

[2] Repair stations make a good example of this position - having accepted the repair station certificate and the privilege it entails, the business enters into the industry with an expectation that

parts. False and Misleading Statements NPRM at 23813. Therefore the Marshall exception does not apply here, particularly to distributors, because there is no long tradition of close government supervision of aircraft parts distribution. Thus, aircraft parts distributors are not under any constructive notice of the likelihood of surveillance. Because there has been no reason for distributors of parts to believe that the FAA may enter their warehouses and search them without cause or warrant in the past, there is currently no justification under the Marshall test for future warrantless searches - aviation parts distributors have NOT been subject to the sort of close governmental supervision that puts them on notice of the probability of warrantless administrative searches.

Donovan v. Dewey explained that there is an exception that arises when "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme, and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 452 U.S. 594, 600 (1980). Unlike the MSHA inspection program in Donovan v. Dewey, however, there is no Congressional finding that the aviation industry has a poor safety record (or a poor record for veracity) that has a significant deleterious effect on interstate commerce. Donovan v. Dewey, 452 U.S. 594, 602 (1980). Instead, the FAA admits that there are merely isolated incidents of false or misleading statements. E.g. False and Misleading Statements NPRM at 23808.

In the context of a regulatory inspection system of business premises – even one that is carefully limited in time, place, and scope - the legality of the search depends on the authority of a valid statute. United States v. Biswell, 406 U.S. 311, 315 (1972). There is no valid statutory authority in this case.

Finally, there are public interest exceptions to the warrant requirement. These arise only where there is a showing that the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 533 (1967) (warrantless searches not allowed when no prior showing of particular need has been made); cf. Schmerber v. California, 384 U.S. 757, 770-771 (1966) (dynamic nature of blood alcohol level justified warrantless blood testing for alcohol). There has been no such showing that the burden of obtaining a warrant would frustrate the law enforcement goals in this case. In fact, the past history of successful warrant-based searches in the aviation industry weighs against the application of this exception.

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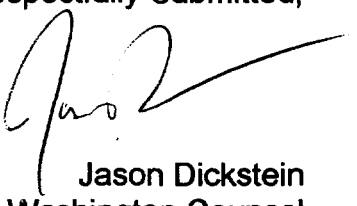
the FAA will be able to enforce the compliance inspection provisions of 14 C.F.R. § 145.223(a) (2003) and its predecessor regulation 14 C.F.R. § 145.23 (2001).

CONCLUSION

For the reasons described in these comments, ASA asks the FAA to withdraw this proposed regulation. In the alternative, ASA asks the FAA to replace the language of proposed section 3.1 with the ASA recommended language, and to strike in their entirety sections 3.5(d), 3.5(e),and 3.5(f).

Respectfully Submitted,



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